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No. 07-324

# In the Supreme Court of the United States

VICTOR MCKEEVER, PETITIONER

*v.*

WARDEN SCI-GRATERFORD, *ET AL.*, RESPONDENTS

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## REPLY IN SUPPORT OF CERTIORARI

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## REPLY IN SUPPORT OF CERTIORARI

Respondents have made no attempt to defend the decision below on its merits. That is understandable, since respondents cannot dispute the facts that (1) the parties and the trial court were mistaken about the criminality of petitioner's conduct under the Pennsylvania Corrupt Organizations Act ("PACOA"); (2) as a result of this mistake, petitioner pled guilty to two crimes that were not actually crimes; and (3) as a result of this guilty plea, petitioner was exposed to an additional 14 years' imprisonment. In response to the petition, respondents have not even disputed that petitioner's guilty plea was unknowing or involuntary and thus "constitutionally invalid," *Bousley* v. *United States*, 523 U.S. 614, 618 (1998), or that the mutual mistake was *material* to petitioner's decision to enter the plea. If respondents do not dispute these basic facts, why is petitioner still in prison, serving a sentence that was imposed pursuant to an admittedly unconstitutional guilty plea?

Respondents' sole answer to this question, and their sole argument in opposition to *certiorari*, is the truism that habeas review is not direct review. According to respondents, the decision below turns on the principle of comity, not on the scope of petitioner's constitutional rights. And since the decision below is a habeas decision, it cannot possibly conflict with non-habeas decisions.

As we demonstrate below, respondents' argument suffers from two fundamental flaws. *First*, contrary to respondents' assertion, the outcome of this case does, in fact, turn on the resolution of the question presented. That is why the court below spilled so much ink addressing it, and that is why the majority

below characterized its resolution of that issue as the *holding* of the case. *Second*, the distinction between habeas review and direct review simply makes no difference here, because the question presented involves the scope of petitioner's constitutional rights rather than the scope of review of a state court's judgment. If due process requires that a criminal defendant be permitted to rescind a plea agreement that is based on a mutual mistake about the criminality of his conduct, that rule must apply equally on habeas review and on direct review.

## I. The Decision Below Turns Precisely On The Question Presented.

Respondents are demonstrably incorrect in their assertion that the decision below "did not rule on the question of when mutual mistake of fact mandates rescission of a guilty plea." Opp. at 8. According to respondents, the decision below instead "turns on application of principles inherent in federal review of a state court conviction and contains no binding authority on rescission of a guilty plea." Opp. at 12. That statement is false, and ignores the plain terms of the decision below.

Contrary to respondents' assertion, the decision below turns precisely on the question presented. Indeed, respondents' attempt to rewrite the decision below is conclusively refuted by the plain terms of the majority opinion: "Because we *hold* that the PACOA charges were not an essential part of the agreed exchange, rescission of the plea is not necessary and the Commonwealth did not err in vacating the two PACOA counts and resentencing McKeever based upon the remainder of the plea agreement." Pet. App. 14a (emphasis added); see also Pet. App. 34a ("I

respectfully dissent from the majority's holding that vacating the PACOA convictions and resentencing was a sufficient remedy").

To arrive at this holding—that rescission is not necessary to remedy the due process violation and that petitioner could be resentenced under a judicially-modified plea agreement—the court below specifically "decline[d] to adopt a rule that renders a multi-count plea agreement *per se* invalid when a subsequent change in the law renders a defendant innocent of some, but not all, of the counts therein" and further "reject[ed] the argument that such a plea could never be entered by a defendant voluntarily and intelligently." Pet. App. 7a-8a. Again, the majority concluded that "vacating McKeever's plea agreement was not the only legally permissible remedy." Pet. App. 15a.

These holdings do not rest on principles of comity or federalism, but rather on the majority's view of the substance of petitioner's due process rights. The majority held that although due process would not permit petitioner's conviction on the PACOA counts, due process would allow resentencing under a judicially-modified plea agreement. See Pet. App. 8a, 14a. Judge Roth disagreed, explaining that rescission of the plea agreement is the *only* cure for the violation of petitioner's due process rights. See Pet. App. 17a.

Had the majority agreed with Judge Roth on this point, the decision below would have been different. Specifically, the court below would have directed the district court to allow the Commonwealth a reasonable time in which to vacate the PACOA convictions, rescind the plea agreement, and either accept a new plea or proceed to trial. See *Brewer* v. *Williams*, 430

U.S. 387, 406 n.13 (1977) (finding a constitutional violation in a habeas proceeding but suspending issuance of the writ for 60 days to allow the State to initiate a new trial consistent with constitutional requirements); *Irvin* v. *Dowd*, 366 U.S. 717, 729 (1961) (directing the habeas court to "allow the State a reasonable time in which to retry petitioner"); *Dowd* v. *United States ex rel. Cook*, 340 U.S. 206, 210 (1951) (directing the habeas court to "allow the State a reasonable time in which to afford respondent the full appellate review he would have received but for the suppression of his papers"). It is common practice to grant habeas relief conditionally (as the district court did here), ordering the prisoner's release unless he is "retried [consistent with constitutional requirements] within a reasonable time which may be specified in the order." 17B Charles A. Wright, *et al.*, *Federal Practice & Procedure: Jurisdiction 3d* § 4268.4 (2007) (quoting 28 U.S.C. § 2243). Of course, the condition must actually cure the constitutional violation.[1]

In sum, the plain text of the decision below makes clear that the result in this case turned on the question whether rescission is the only cure for the due process violation that occurred when petitioner was convicted and sentenced pursuant to a plea agreement that resulted from a mutual mistake. Thus, the question presented—which asks this Court to define the scope of a defendant's due process rights where a guilty plea is based upon the parties' mutual mistake

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[1] Respondents' charge that petitioner seeks to have the federal courts "order a state court to fashion a particular remedy" (Opp. at 10) fails to recognize that any grant of conditional habeas relief effectively orders the state court to cure the constitutional violation as an alternative to the prisoner's immediate release. That is all petitioner seeks here.

about the criminality of his conduct—is dispositive of this case and exposes a clear conflict between the decision below and decisions from other federal and state appellate courts. See, *e.g.*, *United States* v. *Bradley*, 381 F.3d 641 (7th Cir. 2004); *United States* v. *Barron*, 172 F.3d 1153 (9th Cir. 1999) (*en banc*); *United States* v. *Lewis*, 138 F.3d 840 (10th Cir. 1998); see Petition at 8-17 (discussing contrary decisions from federal and state courts).

This Court's review is warranted to resolve that conflict and vindicate the rule of *Bousley* that a defendant cannot be convicted and sentenced pursuant to a plea agreement reflecting the parties' mutual mistake about essential elements of the charged offenses.

## II. The Distinction Between Federal Habeas Review And Direct Review Makes No Difference Here.

Nor is there any merit to respondent's attempt to invoke the distinction between habeas review and direct review. This distinction makes no difference here, because the question presented—on which federal and state appellate courts are divided—involves the scope of protection under the Due Process Clause, an issue wholly unaffected by the procedural posture of the case.

To be sure, limitations on federal habeas review reflect principles of comity and federalism in several ways. Most significantly, 28 U.S.C. § 2254(d) limits the scope of review of a state court's judgment, making habeas relief available only if the state court's decision is "contrary to" or an "unreasonable application of" clearly established federal law. In addition, due regard for comity and federalism are reflected in the

doctrines relating to independent and adequate state grounds, especially procedural default and exhaustion of state remedies. See *Coleman* v. *Thompson*, 501 U.S. 722, 730-731 (1991); *Fay* v. *Noia*, 372 U.S. 391, 430-431 (1963).

The decision below, however, does not turn on the standard of review under § 2254(d), nor does it implicate the concerns animating *Coleman* and *Fay*. Rather, the decision below turns on a straightforward interpretation of the Due Process Clause in the context of a mutually-mistaken plea agreement. The proper interpretation of the Due Process Clause in this context is not affected by the fact that the question happens to arise in a habeas case rather than on direct review.[2] The Due Process Clause means what it means, and this Court's answer to the question presented will apply equally in federal and state courts, in habeas proceedings and on direct review.

1. Unlike *Coleman*, this case does not involve an independent and adequate state ground or a procedural default—the specific subjects of the Court's discussion of comity. See 501 U.S. at 730-731. Petitioner presented his due process challenge to the

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[2] This Court has granted certiorari in other federal habeas cases to consider similar constitutional claims. For example, in *Nix* v. *Williams*, 467 U.S. 431 (1984), this Court resolved the question whether the Fourth Amendment permits a state court to admit evidence under an "inevitable discovery" exception to the exclusionary rule. In *Berkemer* v. *McCarty*, 468 U.S. 420 (1984), another federal habeas case, this Court considered the question whether the *Miranda* rule applies to misdemeanors. And in *Ford* v. *Wainwright*, 477 U.S. 399 (1986), this Court granted certiorari to decide whether the Eighth Amendment forbids execution of insane prisoners. Thus, there is nothing unusual about defining the scope of constitutional rights in the context of a habeas case.

Pennsylvania courts, but his claims were dismissed as untimely. See Pet. App. 4a-5a. The magistrate judge found, however, that any procedural default was excused because of petitioner's *actual innocence* of the PACOA charges, and respondents did not challenge that finding. See Pet. App. 5a, 37a-38a; Supp. App. 6sa. Because petitioner's actual innocence excused any procedural default, *Coleman*'s concern that the state court be given the first opportunity to identify and correct any constitutional violation is not implicated here.

2. Likewise, *Fay* is no obstacle to granting certiorari in this case. As this Court made clear in *Fay*, a federal habeas court is authorized to (1) determine whether the prisoner has been confined contrary to the Constitution or federal statute and (2) if so, order his release. See 372 U.S. at 430. The habeas court "has no other power" except to "act * * * on the body of the prisoner." *Id.* at 431. It is undisputed that petitioner was confined in violation of due process. Rather than order petitioner's release, however, the district court gave the Commonwealth an opportunity to cure the due process violation itself. If, as Judge Roth explained, rescission is the *only* cure for the due process violation at issue in this case, then the district court should have conditioned its stay of the writ upon the Commonwealth court's entering an order vacating the PACOA convictions and rescinding the plea agreement. See Pet. App. 17a, 34a.

Judge Roth's analysis is correct, and rescission is the only alternative to petitioner's immediate release from confinement. Due process requires that a guilty plea be knowing and intelligent, see *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969), and a plea cannot be knowing or intelligent if it is based upon the parties'

mutual mistake concerning an essential element of the charged offense, see *Bousley*, 523 U.S. at 618-619. Where a criminal defendant enters a guilty plea, waiving certain constitutional rights, based upon a mutual mistake, due process requires that he be afforded *at least* the remedies that are available to private contracting parties in similar circumstances. See *United States* v. *Ringling*, 988 F.2d 504, 506 (4th Cir. 1993); *United States* v. *Ingram*, 979 F.2d 1179, 1184 (7th Cir. 1992). Under general principles of contract law, a contract that results from a mutual mistake is voidable at the option of the party aggrieved by the mistake. See *Restatement (Second) of Contracts* § 152 (1979). Accordingly, where a criminal defendant is convicted and sentenced pursuant to a mutually-mistaken plea agreement, in violation of due process, and where the defendant requests rescission of the plea agreement once the mistake is discovered, the judgment of conviction must be vacated and the agreement must be rescinded. See, *e.g.*, *Bradley*, 381 F.3d at 648. Merely resentencing the defendant pursuant to the unconstitutional plea agreement—unilaterally modified to account for vacated convictions—is no cure. See, *e.g.*, *United States* v. *Sandles*, 80 F.3d 1145, 1148 (7th Cir. 1996) ("Where there is a mutual misunderstanding as to the material terms of a contract, the appropriate remedy is rescission, not unilateral modification").

3. Because there is no material distinction between the posture of the decision below and the postures of the other decisions cited in the petition, the conflict created by the decision below is real and significant. The resolution of this conflict will establish a single due process standard applicable in any proceeding raising a similar issue. Accordingly, this case

is an appropriate vehicle for resolution of the question presented, and respondents' opposition to the petition is wholly unfounded.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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